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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE,

Plaintiff and Respondent,

v.

DANIEL PENA GONZALEZ,

Defendant and Appellant.

G052961

(Super. Ct. No. 98NF0875)

O P I N I O N

Appeal from an order of the Superior Court of Orange County, M. Marc Kelly, Judge. Affirmed.

Joanna Rehm, under appointment by the Court of Appeal, for Defendant and Appellant.

No appearance for Plaintiff and Respondent.

In 1999, appellant Daniel Pena Gonzalez was convicted of assault with a deadly weapon and it was found that he had suffered two prior convictions under California's Three Strikes law. He was sentenced to 25 years to life in prison plus an additional five years for a prior serious or violent felony. He appealed and the additional five-year term was stricken, but the conviction and the 25 years to life sentence were upheld.

In 2014, he petitioned for relief under Proposition 36, also known as the Three Strikes Reform Act, and codified as Penal Code section 1170.126 and related sections.¹ After extensive briefing and argument by both sides, he was refused because his crimes did not qualify for consideration under the new law. He appealed.

We appointed counsel to represent him on that appeal. Counsel filed a brief which set forth the procedural facts of the case (the facts of the crimes themselves are largely irrelevant because the argument is solely directed at Gonzalez's plea and the application to it of § 1170.126 and the laws enacted to put it into effect). Counsel did not argue against her client, but advised us there were no issues to argue on his behalf.

Gonzalez was invited to express his own objections to the proceedings against him. The time allotted for such a supplemental brief has passed and he has filed no such brief. Under the law, we are required to review the record and see if we can find any issues that might result in a finding of error when an attorney tells us he/she is unable to. (*People v. Wende* (1979) 25 Cal.3d 436.) We have done so. We have looked not just at the issues Guzman's attorney informs us she considered but also for whatever other issues might exist. It should be emphasized that our search was not for issues upon which Guzman *would* prevail, but only issues upon which he *might possibly* prevail.

We have found no such issue. It is true that Gonzalez's offense – assault with a deadly weapon – was not classified as a serious felony when it was committed.

¹

All further statutory references are to the Penal Code.

But last year the California Supreme Court decided that for purposes of Proposition 36, “the classification of the current offense as serious or violent is based on the law as of November 7, 2012, the effective date of Proposition 36.” By that time, assault with a deadly weapon had been incorporated into the list of serious and violent felonies for purposes of the Three Strikes law.

While counsel also considered a “law of the case” challenge to Gonzalez’s sentence, that argument also fails. (*People v. Superior Court (Plasencia)* (2002) 103 Cal.App.4th 409, 432). An “intervening or contemporaneous change in the law” is an exception to the application of the law of the case doctrine. (*Clemente v. State of California* (1985) 40 Cal.3d 202, 212.) Nor can we find any other arguable issue.

Appellate counsel was correct in concluding there was no arguable issue on appeal.

The order is affirmed.

BEDSWORTH, ACTING P. J.

WE CONCUR:

FYBEL, J.

IKOLA, J.